IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 9141 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DILIPSINH SHAMBHUJI BIHOLA - Petitioner(s)

Versus

STATE OF GUJARAT & 2 - Respondent(s)

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Appearance :
MR JAYANT P BHATT for Petitioner(s) : 1,
GOVERNMENT PLEADER for Respondent(s) : 1 - 3.
RULE SERVED BY DS for Respondent(s) : 1 - 3.
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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 28/11/2005

ORAL JUDGMENT

1.With the consent of the learned advocates appearing for both the sides, the main S.C.A. is taken for final hearing today.

2.The petitioner has prayed for the reliefs inter alia to direct the respondent to pay regular pay scale from the date of joining the service as a driver. The petitioner has also prayed for directing the respondent to absorb the petitioner on regular and permanent establishment as driver instead of Rojmadar driver. By amendment, the petitioner has added the prayer for challenging the order of termination dated 31.08.2005 as illegal.

3.Upon hearing Mr.Jayant P. Bhatt, learned counsel for the respondent and Mr.Desai, learned A.G.P. for the petitioner, it appears that on the following points, there is no dispute.

1.The petitioner was appointed as a daily wager driver.

2.The appointment of petitioner was not

renewed as daily wager and, therefore, he is not in service from 31.08.2005.

3. The petitioner was not selected by the regular selection process.

4. The regular post of driver which was sanctioned was also for fixed pay-scale.

5. One of the conditions provided in the appointment order of the petitioner was for termination or non-renewal of the employment as and when services were not required.

6. The regular selection had taken place, the petitioner did participate and in the list, the name of the petitioner is at Sr. No.4.

7. The car which was part of the establishment is cancelled and as such the provision for the car is not available.

8. Further, it is the case of the petitioner that in the office of the Commissioner of Industries, the requirement may arise for appointment of driver on account of the car

allotted to other officers.

4.In view of the above factual aspects, the relief prayed by the petitioner for absorption in the permanent establishment or as a regular driver cannot be granted. The reference may be made to the decision of the Apex Court in case of **Mahendra L. Jain and others V/s. Indore Development Authority and others** reported in 2005(1) S.C.C.639 more particularly the observations made at para-19. The reference may also be made to the another decision of the Apex Court in case of **Dhampur Sugar Mills Ltd., V/s. Bhola Singh** reported in 2005(2) S.C.C.470, more particularly the observations made at para-18 on wards. In the same manner, the petitioner was also appointed on daily rated basis. He would not be entitled to regular pay-scales which are being paid to the drivers in the permanent set-up. Therefore, the relief for regular pay-scale also cannot be granted.

5.If the appointment of daily rated employee is not continued, such cannot be said to be an illegal action which would call for interference because the engagement is on daily rated contract basis and the non-continuation by the employer would not confer any right of the daily rated employees to assert that they must be continued in services. In any case, if the petitioner has not worked during the said period on account of non-continuation of the contract, he would not be entitled to the salary also.

6.However, it appears that, by an interim order dated 27.09.2004 passed by this Court, the petitioner was ordered to be continued as daily wager driver and the petitioner is continued as daily wager driver and in the meantime, the selection has taken place. The petitioner has participated in this selection. The name of the

petitioner is at Sr. No.4 and, therefore, as and when the Sr. number of the petitioner reaches, the petitioner would be entitled for the appointment on regular basis, may be also for fixed pay.

7.The grievance raised on behalf of the petitioner that some body else may be appointed as daily wager by ignoring the past records of the petitioner as daily wager, deserves consideration. If there are regularly selected candidates available, the petitioner cannot steal march over such candidates. At the same time, if the daily wagers are to be appointed then in normal situation, unless the functioning as the daily wager is un-satisfactory, on the basis of their seniority they should be re-employed. Therefore, at the most the petitioner's case is required to be considered on priority basis as per interse

seniority of daily wager drivers if, in the office of the Commissioner of Industries, any other daily rated drivers are to be appointed.

8. In view of the aforesaid, the relief prayed by the petitioner for regular pay-scale and for absorption in the regular cadre and for challenging the termination cannot be granted. However, it is clarified that as and when any vacancy arises of the drivers in the office of the Commissioner of Industries and if such posts are to be filled up by the persons other than regularly selected candidates on the post of driver by giving the appointment as daily wager, then in that case, the priority as per interse seniority as daily wager shall be given to the petitioner, keeping in view the facts and circumstances that the petitioner has worked for a period of about more than five years as a daily wager.

9.Subject to the aforesaid observations and directions the petition is dismissed. Subject to aforesaid, Rule discharged. Considering the facts and circumstances, there shall be no order as to costs.

In view of the order passed in the main Special Civil Application, Civil Application No.11562 of 2005 would not survive and hence the same shall stand disposed of accordingly.

(JAYANT PATEL,J.)

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